Employment and Intellectual Disability

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Under recent decisions of the United States Supreme Court, people with disabilities alleging employment discrimination under the Americans with Disabilities Act (ADA) are caught in a vicious triangle. One vertex of the triangle is self-accommodation. Correcting for their impairments through effort, prosthetic devices such as eyeglasses, hearing aids, or medications, they are evaluated in their ameliorated state and do not qualify as disabled at all.[1] At this self-accommodation vertex, they are not entitled to the protection of the ADA because they are not disabled under current interpretations of the ADA.[2] A second vertex is the ability to succeed in some jobs, despite impairments. At this vertex, people with impairments may be unable to claim the protection of the ADA because of their success in working. Their difficulty lies in identifying a major life activity substantially limited by their impairment. Although "working" is a major life activity, current case law requires people to show their inability to perform a range of jobs, not merely the particular job for which they are seeking ADA protection, in order to count as "substantially limited" in working and thus as disabled.[3] By virtue of their success at some jobs, people at this second vertex may also find it difficult to demonstrate substantial limits in other major life activities, such as learning. At the third vertex are people who neither self-accommodate nor succeed even with accommodations. Instead, they continue to encounter apparent difficulties in performing the job at issue, at least with the accommodations proposed for them. But they are barred from claiming the protection of the ADA to seek further accommodations because

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1. *See, e.g.*, Sutton v. United Airlines, 527 U.S. 471 (1999).

2. An alternative strategy is to try to bring a case under the third, "as regarded as" prong of the definition of disability, 42 U.S.C. § 12102(2)(C) (2004). Under this prong, the plaintiff contends that the employer acted adversely out of the mistaken belief that the plaintiff was disabled. This prong is unlikely to succeed, however, if courts require that the employer not only regard the employee as impaired, but also regard him/her as limited in a major life activity because of the impairment. Under this reading of the "as regarded as" prong, the employer must have beliefs that, if true, would bring the employee under the first prong of the definition of disability. 42 U.S.C. § 12102(2)(A) (2004). Suppose the employer just says, "I didn't think E could do this job. That doesn't mean I thought he couldn't work, which is what I would have had to have thought to have regarded him as unable to perform the major life activity of working." These beliefs, if true, would not bring the employee under the first prong, and thus the employee would not qualify under the third prong either. *See, e.g.*, Deas v. River West, L.P., 152 F.3d 471 (5th Cir. 1998) (discussing an employee with seizure disorder).

3. *See, e.g.*, Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184 (2002).

they are deemed not "qualified" for the job.[4] Self-accommodated, successful, or unsuccessful, people with mental or physical impairments find themselves unprotected under current anti-discrimination law in the United States.

This triangle poses especially serious difficulties for people with intellectual disabilities. As the data cited below indicate, people with even mild cognitive impairments cluster at the third vertex, that of people who neither self-accommodate nor demonstrate that they are otherwise qualified for the employment they seek. Whether the problematic limits in the structure of current law can explain their clustering at this vertex is controversial. A number of different interpretations might explain why people with cognitive disabilities cluster problematically at the third vertex. One interpretation is that the ADA is interpreted too narrowly: although the ADA is properly understood as a statute that levels the playing field by prohibiting discrimination, recent cases have unjustifiably curtailed this understanding. A second interpretation is that employment law for people with intellectual disabilities focuses only on the prohibition of discrimination. People with intellectual disabilities, under this interpretation, cannot succeed competitively. Instead, they require further support if they are to become employed or otherwise survive economically. The third interpretation is that there is a mismatch between the anti-discrimination paradigm of the ADA and how courts and the law understand the current structure of employment. For example, some fruitful accommodations for people with cognitive disabilities, such as job coaches or employment teams, have seemed to some courts to put individual qualifications into apparent question. Such courts, by misunderstanding the nature of these accommodations, have erroneously concluded that the ADA does not protect these accommodations.

This essay begins with an overview of the problem of employment for people with life-long intellectual impairments. It then argues for the importance of employment for people with cognitive impairments. Although a number of commentators have addressed the case for employment of people with disabilities generally, less has been said about employment of people with intellectual disabilities specifically. The essay then explores anti-discriminationism, welfarism, and assumptions about the structure of employment as explanations of why current ADA jurisprudence has left people with intellectual impairments largely unprotected. The analysis focuses on several recently reported decisions in employment discrimination claims brought by people with intellectual impairments. These decisions raise typical problems concerning employment discrimination for people with intellectual disabilities. In these cases, courts make assumptions about the structure of employment and what it means to be a qualified employee that disadvantage

4. The definition of "qualified individual" with a disability is at 42 U.S.C. § 12111(8) (2004). *See, e.g.*, Albertson's, Inc. v. Kirkingburg, 527 U.S. 555 (1999) (holding that an individual was not "qualified" despite self-accommodation).

people with intellectual disabilities. This essay thus defends the third interpretation—that courts have failed to understand the structure of work—as an unexplored possibility for many people with intellectual impairments: as long as anti-discrimination policy is seen as applying to individual employees and employers, people with intellectual disabilities remain at risk of clustering at the third vertex, erroneously and dishearteningly viewed as unqualified for employment they seek.

I. WORK AND INTELLECTUAL IMPAIRMENT

People with intellectual disabilities are more likely to face problems in finding and keeping employment than are people with physical disabilities. Yet, employment is an important good for them. Their capacities to work are too frequently under-appreciated and under-utilized.

A. The Current Employment Situation for People with Intellectual Impairments

Even though the ADA has been law in the United States for nearly fifteen years, the employment picture for people with disabilities generally, and for people with lifelong intellectual disabilities more specifically, remains checkered. "Mental retardation" is defined in terms of limits in intellectual ability and adaptive behavior, manifested before adulthood.[5] The Association of Retarded Citizens (ARC) estimates that between 2.5 and 3% of the population (between 6.2 and 7.5 million) are persons with mental retardation.[6] The majority of these (85%) have estimated IQ scores between 50 and 75, placing them in the mild to moderate range.[7] A number of genetic diseases are associated with mental retardation,[8] some of which, such as PKU, have increasingly been recognized as amenable to medical management.[9]

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5. CLIFFORD J. DREW & MICHAEL L. HARDMAN, MENTAL RETARDATION: A LIFESPAN APPROACH TO PEOPLE WITH INTELLECTUAL DISABILITIES 18-19 (8th ed. 2004). There are notorious difficulties in measuring both IQ and skills in social adaptation. Current work on mental retardation recognizes the extent to which it is a social concept. *Id.* at 19. The idea of "six-hour retardation"—people who function reasonably well in ordinary life, but not in school—emphasizes both cultural factors and the importance of broadening the definition of retardation beyond performance on selected academic tasks. LYNDA CRANE, MENTAL RETARDATION: A COMMUNITY INTEGRATION APPROACH 75 (2002).

6. Association of Retarded Citizens, *at* http://www.thearc.org/faqs/mrqa.html (last visited June 1, 2004) [hereinafter ARC]. The estimate of 3% has remained consistent over the past forty years. *See* ROBERT B. EDGERTON, THE CLOAK OF COMPETENCE 1 (1993).

7. EDGERTON, *supra* note 6, at 4.

8. *Id.* at 2.

9. Richard Koch et al., *Long-Term Beneficial Effects of the Phenylalanine-Restricted Diet in Late-Diagnosed Individuals with Phenylketonuria*, 67 MOLECULAR GENETICS & METABOLISM 148 (1999), *available at* http://pkunews.org/ (last visited September 6, 2004).

Chromosomal anomalies are also a leading cause of retardation. About 1 to 1.5/1000 live births are persons with Down syndrome.[10] Other chromosomal anomalies occur less frequently. Fragile X is a mutation of the X chromosome that occurs in approximately 1/3600 males and 1/4000 to 6000 females. [11] Nearly all of the affected males have mental retardation (they lack a second X chromosome, so are more severely affected), and about a third of the females have mental retardation. [12] Autism is also associated with mental retardation; estimates of the prevalence of autism are one in two hundred fifty live births, with the majority of diagnoses occurring in males.[13] Finally, problems with pregnancy, birth, and postnatal living situations (such as exposure to lead) are leading causes of mental retardation.[14]

People with disabilities of all kinds are significantly more likely to be unemployed than are members of the general population. The best data concerning employment of people with disabilities are found in the survey conducted every four years by the Harris Poll for the National Organization on Disability.[15] The 2000 data indicate that, "among adults of working age (18 to 64) with disabilities, three out of ten (32%) work full or part-time, compared to eight out of ten (81%) of those without disabilities, a gap of forty-nine percentage points."[16] The more severe the disability, the less likely a person is to be employed. People with minor disabilities are eight times more likely to be employed than are people with very severe disabilities (64% versus 8% respectively).[17] These figures reveal a growing divergence between the life circumstances of people with disabilities who are unable to work in any capacity and the employment situation for people with disabilities who are able to work. On the one hand, the percentage of people with disabilities who report that they are unable to work at all rose steadily from 1986 to 2000, from 29% to 43%.[18] On the other hand, among those with disabilities who are able to work, 56% are working, up from 46% in 1986.[19] However, the unemployment rate for

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10. DREW & HARDMAN, *supra* note 5, at 158.

11. National Fragile X Foundation, *at* http://www.fragilex.org/html/summary.htm (last visited June 1, 2004).

12. *Id.*

13. Autism Society of America, *at* http://www.autism-society.org/site/PageServer?Pagename=whatisautism (citing CDC data) (last visited June 1, 2004).

14. ARC, *supra* note 6.

15. National Organization on Disability, *available at* http://www.nod.org/content.cfm?id=14 (last visited June 2, 2004). The 2004 survey will begin in late June, 2004.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

people with even mild intellectual impairments remains high, estimated at between 70% and 80%.[20] Nearly one-third of people qualifying for Supplemental Security Income (SSI) have a primary diagnosis of mental retardation.[21]

Many barriers impede the employment of people with congenital intellectual impairments. These include negative attitudes among employers, separation between special education and vocational programs, lack of supportive services, and a tendency to segregate people with cognitive disabilities into sheltered work arrangements.[22] The structure of Social Security disability generates other disincentives, under which people with disabilities who go to work may lose income support and eligibility for Medicaid.[23]

Yet another set of difficulties, less well understood, may rest in the life cycles of people with different types of life-long intellectual impairments.[24] There are wide varieties in the conditions and trajectories of adults with intellectual disabilities. For example, generalizations encompassing people with Down syndrome and people with fragile X syndrome are inappropriate.[25] Little research has been directed towards the aging process of adults with mental retardation.[26] There is some evidence that people with Down syndrome may show the biological characteristics and symptoms of Alzheimer's disease at earlier ages than is typical of the general population.[27] If so, this would suggest the need for further analysis of the time at which people with Down syndrome should be considered "elderly,"[28] and additional attention to whether standard patterns, such as retirement ages, should be applied to people with Down syndrome. Given such limited knowledge of the varied life cycles of people with intellectual impairments, the general use of the imagery of childhood in descriptions of them is particularly problematic.[29] Language such as

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20. John Kregel, *Promoting Employment Opportunities for Individuals with Mild Cognitive Limitations: A Time for Reform, in* THE FORGOTTEN GENERATION: THE STATUS AND CHALLENGES OF ADULTS WITH MILD COGNITIVE LIMITATIONS 87 (Alexander J. Tymchuk et al. eds., 2001).

21. Mark C. Weber, *Disability and the Law of Welfare: A Post-Integrationist Examination*, 2000 U. ILL. L. REV. 889, 896 n.43 (2000).

22. Kregel, *supra* note 20, at 87.

23. *Id.* at 93.

24. DREW & HARDMAN, *supra* note 5, at 316.

25. LYNDA CRANE, MENTAL RETARDATION: A COMMUNITY INTEGRATION APPROACH 85 (2002).

26. DREW & HARDMAN, *supra* note 5, at 319.

27. *Id.* at 323.

28. *Id.* at 319.

29. *Id.* at 282.

"developmentally delayed" or "mentally retarded" suggests people who are changing along common trajectories, albeit more slowly. Classifications in terms of mental age ("a mental age of six") suggest perpetual childhood. Such imagery may support the idea that people with intellectual disabilities are not yet adults and so do not need employment—or need employment only in separate or sheltered settings. Adults with cognitive disabilities, however, are not just larger children, suspended Peter-Pan-like in states of arrested development. They are adults, with all the variety of interests and capacities this suggests.

B. The Importance of Work

In a by-now classic paper, "Disability and the Right to Work,"[30] Gregory Kavka argued for the right of people with disabilities to employment. Kavka called on rights discourse to signal that strong moral arguments favor the social goal of employment for people with disabilities.[31] He also used rights discourse to emphasize that employment grounds urgent and important claims for individuals with disabilities against other individuals and groups, and that the claims advanced are realizable.[32] Kavka recognized the importance of work for minimal economic survival.[33] Indeed, the current federal benefit level for SSI, the program for people who are disabled, do not qualify for Social Security, and meet income and asset qualifications, is $564/month for an individual, hardly a livable stipend even if it is supplemented by state stipends and Medicaid eligibility.[34] But Kavka defends a far more robust right to work than the right to a minimum income stream: the right to work as an active member in productive processes, to the extent feasible.[35]

Self-respect is the basis of Kavka's claim to employment as a right.[36] Self-respect is a good of great importance that any rational person would be presumed to want.[37] In contemporary society, Kavka observes, individuals'

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30. Gregory S. Kavka, *Disability and the Right to Work*, 9 SOC. PHIL. & POL'Y 262 (1992), *reprinted in* AMERICANS WITH DISABILITIES: EXPLORING IMPLICATIONS OF THE LAW FOR INDIVIDUALS AND INSTITUTIONS 174-92 (Leslie P. Francis & Anita Silvers eds., 2000).

31. *Id.* at 176.

32. *Id.*

33. *Id.* at 175 ("Most importantly, the right to work is a right to *employment*; it is a right to *earn* income, not simply a right to receive a certain income stream or the resources necessary to attain a certain level of welfare.").

34. Social Security Online, *at* www.ssa.gov/pubs/10055.html (last visited June 2, 2004).

35. Kavka, *supra* note 30, at 175.

36. *Id.* at 179.

37. *Id.*

senses of self-worth are tied critically to work and career.[38] Work generates reciprocal interaction between respect from others and respect for self.[39] Through work, people receive affirmation of their own worth from others.[40] They also receive satisfaction from their own accomplishments. Concerns might be raised about how Kavka uses work in developing this account. His description of how self-respect is gleaned from respect from others is couched in terms of professional work.[41] Critics might question whether this dynamic of respect works as well for the types of employment accessible to people with intellectual disabilities. Scholars of intellectual disability, however, report that people with intellectual disabilities receive important self-affirmation from meaningful work even if the jobs are not in the professions.[42] Through work, people do things for others and gain appreciation for what they do. Critics might also question whether Kavka is right to tie self-respect to individual work achievement in a manner that places individual talents at the forefront.[43] Work, however, as I discuss below, need not be conceived in individualized terms; people can both give and gain mutual respect through cooperative participation in productive activity.

Employment brings benefits in addition to a sense of meaningful contribution. Employment brings structure to daily life and connection to the community. Employment can be a source of friendship and a variety of experiences. People with mental retardation may have difficulty with the social skills necessary to acquire and maintain friendships; isolation exacerbates these disabilities.[44] Work increases self-esteem, gives opportunities for social contacts, provides a place within the community, and offers wages that can be the basis for autonomy and independence.[45] There is also some evidence that the experience of working for wages increases scores on measures of competence, independence, and social responsibility.[46]

At the level of philosophical theorizing about justice, additional

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38. *Id.*

39. *Id.*

40. *Id.*

41. Kavka, *supra* note 30, at 179.

42. *See* Patricia Rogan et al., *Career Development: Helping Youth with Mild Cognitive Limitations Achieve Successful Careers*, *in* THE FORGOTTEN GENERATION: THE STATUS AND CHALLENGES OF ADULTS WITH MILD COGNITIVE LIMITATIONS 119-37 (Alexander J. Tymchuk et al. eds., 2001).

43. RICHARD SENNETT, RESPECT IN A WORLD OF INEQUALITY 263 (2003).

44. CRANE, *supra* note 25, at 386.

45. *Id.* at 366.

46. *Id.* (citing R. Gersten et al., *Spillover effects: Impact of vocational training on the lives of severely mentally retarded clients*, 90(5) AM. J. MENTAL DEFICIENCY 501 (1986)).

considerations support recognition of the capacities for employment of people with intellectual disabilities. John Rawls, perhaps the most influential twentieth century theorist of justice, saw the problem of distributive justice as how the benefits and burdens of social cooperation are to be shared.[47] In Rawls' view, the subjects of justice are limited to those who are full cooperators in social life.[48] Under this approach to justice, people who are not able to cooperate in shared social life may be owed charity, but they are not owed duties of justice as primary subjects of justice. As a result, their claims are at risk of being regarded as secondary and derivative, to be satisfied after the demands of justice on behalf of full cooperators have been met.[49]

In his work on justice, Rawls set a controversial threshold for people to be considered full cooperators and thus primary subjects of justice. His threshold was set in terms of what Rawls believed to be critical to being a moral person. Rawls thought that full cooperators must be capable of participating in the collective life of society through exercising what he identified as two critical moral powers, the capacity for a sense of justice and the capacity to develop a conception of the good.[50] Depending on what the exercise of these moral powers is understood to involve, people with intellectual disabilities may or may not fit the full Rawlsian description. Disability scholars have devoted considerable attention to the construction of accounts of the good by, with, and for people with cognitive disabilities.[51] Understanding people with cognitive impairments as having a principled understanding of justice on their own may be more difficult, to the extent that cognitive impairments are linked to difficulties of abstract reasoning. Having a sense of fairness, however, may be a far more accessible matter. Other scholars of disability have argued that it is a mistake to view moral personhood in terms of an individualistic vision of

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47. JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 7 (Erin Kelly ed., 2001).

48. *Id.* at 18.

49. This is a complicated question, worthy of extensive philosophical exploration. For a criticism of whether Rawls particularly, and the social contract tradition more generally, is fair to people with disabilities, *see* Martha Nussbaum, Beyond the Social Contract: Towards Global Justice, Lecture 2, Tanner Lectures (Nov. 12-14, 2002), *available at* http://philrsss.anu.edu.au/tanner/papers/ (last visited June 4, 2004).

50. RAWLS, *supra* note 47, at 18.

51. These issues are complex. Agnieszka Jaworska has explored how people who have become cognitively compromised can be said to value and thus exercise autonomy. Agnieszka Jaworska, *Respecting the Margins of Agency: Alzheimer's Patients and the Capacity to Value*, 28 PHIL. & PUB. AFF. 105 (1999). In another paper, I am exploring how people with congenital cognitive impairments can be said to have a conception of the good and make critical decisions governing their lives. The capacity for a sense of justice—if it involves the ability to act with full understanding of the principles of justice as Rawls, at least, suggests it does—may be more difficult to attribute, at least to adults with more than mild mental retardation. These issues I largely set aside in this paper. However, I do take up the other set of issues, the problem of economic contribution, in later sections of the paper.

separateness and self-determination, as Rawls appears to do.[52] Still others have questioned whether the capacity for moral agency as Rawls understands it should be the basis for inclusion as a primary subject of justice.[53] Dignity has been suggested as an alternative.[54]

Another way to interpret what is required for full cooperation is in terms of participation in the economic life of society. Based on this interpretation, one would be a full cooperator, and hence a primary subject of justice, if one participated to the requisite extent in the process of producing the benefits of social cooperation. The idea behind this interpretation is that being a primary subject of justice rests on being an economically productive member of society. Here, the issue concerning people with cognitive disabilities would be the type and level of productive contribution required. If problematic assumptions are avoided, this requirement can be met for many with intellectual disabilities. For example, it would be a very strong claim to hold that a necessary condition for being a productive member of a cooperative scheme is being an individual who is able to work independently or alone. Indeed, it might well be the opposite if what is at issue is participation in a cooperative scheme. In the cases discussed below, the need for supported or teamed employment when people have intellectual disabilities is a recurrent theme. Yet, these are not unusual features of employment; employment of many kinds involves teamwork, support, and interdependence. To garner the interactive respect available from employment does not require that one work entirely independently or unsupported. It requires that one contribute interactively. To take a second example, it would also be a problematically strong claim to require that people contribute equally to the social product in order to be considered full cooperators. People simply do not contribute equal economic value—or equally in any other way. To be sure, theorists of justice might try to defend some minimal threshold of productive contribution, but surely this is a threshold many persons with intellectual disabilities can meet, provided they are given the opportunity. As long ago as the early 1960s, Robert Edgerton's path-breaking study demonstrated the woeful underestimation of the capacities for work of people with intellectual disabilities.[55]

This discussion is not meant to defend a view of justice as primarily a matter of distribution among full cooperators. To the extent that the Rawlsian view is accepted, however, it provides further reason to emphasize the importance of work for people with intellectual disabilities. For it may be

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52. *See, e.g.*, PETER BYRNE, PHILOSOPHICAL AND ETHICAL PROBLEMS IN MENTAL HANDICAP 13 (2000).

53. *E.g.*, HANS S. REINDERS, THE FUTURE OF THE DISABLED IN LIBERAL SOCIETY: AN ETHICAL ANALYSIS 105 (2000).

54. *E.g.*, SANDRA FREDMAN, DISCRIMINATION LAW 17 (2002).

55. EDGERTON, *supra* note 6.

through work that they achieve the status of subjects of justice. In any event, if they are regarded, erroneously, as unable to participate cooperatively, through work or other social interactions, they may lose a critical basis of moral respect.

II. INTERPRETING THE ADA PARADIGM WITH RESPECT TO PERSONS WITH INTELLECTUAL DISABILITIES

As several recent cases illustrate, people with cognitive disabilities have not found much success in pursuing claims of employment discrimination under the ADA. Despite initial enthusiasm, the ADA has not fully met expectations for people with intellectual disabilities.[56] There are at least three interpretations of why this might be so. One is that the courts' current understanding of the ADA is unjustifiably narrow, in ways that apply particularly to people with intellectual impairments. A second is that because people with intellectual impairments require special supports, civil rights guarantees, no matter how interpreted, will not provide the supports they need. The third, emphasized here, is that there is a misfit between the civil rights paradigm and assumptions made by courts and the law about the structure of employment. These assumptions are both unjustified and function to disadvantage people with cognitive impairments.

A. Leveling the Playing Field: The ADA as a Civil Rights Statute

The goals of the ADA were to eliminate arbitrary restrictions on the ability of people with disabilities to be in the world, to achieve equal opportunity for people with disabilities, and to eliminate unnecessary dependency for people with disabilities.[57] In interpreting Title I of the ADA, the employment discrimination title, many commentators have argued that Title VII of the Civil Rights Act[58] should serve as a model.[59] In this model, equal employment opportunity for people with disabilities principally requires removal of barriers from environments constructed in such a way that physical or mental impairments manifest themselves as disabilities. "Reasonable

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56. Peter Blanck & Helen A. Schartz, *Studying the Emerging Workforce*, *in* THE HUMAN RIGHTS OF PERSONS WITH INTELLECTUAL DISABILITIES: DIFFERENT BUT EQUAL 356 (Stanley S. Herr et al. eds., 2003).

57. 42 U.S.C. § 12101(a) (2004). *See* AMERICANS WITH DISABILITIES: EXPLORING IMPLICATIONS OF THE LAW FOR INDIVIDUALS AND INSTITUTIONS, at xx (L.P. Francis & A. Silvers eds., 2000) [hereinafter AMERICANS WITH DISABILITIES].

58. 42 U.S.C. § 2000(e) (2004).

59. *See, e.g.*, Anita Silvers, *The Unprotected: Constructing Disability in the Context of Antidiscrimination Law*, *in* AMERICANS WITH DISABILITIES, *supra* note 57, at 126.

accommodations"[60] serve to remove barriers; they do not provide "special" privileges.

But for persons with cognitive disabilities, when the ADA is understood as a civil rights statute, it may prove insufficient to generate employment opportunities on a competitive basis. The analytic question is whether this insufficiency is the result of an unjustifiably narrow reading of civil rights, or the result of the need people with cognitive disabilities have for more protection than civil rights can provide them. Consider, for example, the situation of Joseph Phillips.[61] Phillips was a man with mild mental retardation, who began working for DAP (a manufacturer of building products) in 1977.[62] He held the lowest position at the factory, termed "Entry Level/Utility," and his work consisted of stacking buckets on pallets and helping to clean the warehouse floor.[63] He was unable to perform any other tasks at DAP, but he had performed his assigned tasks for over fifteen years and his employer did not allege any problems with his performance.[64] By 1995, DAP was experiencing both a downturn in business and increased production efficiency.[65] As a result, DAP decided to reduce the payroll from twelve to eleven employees.[66] Because DAP could not reassign Phillips to other positions, the employer eliminated Phillips.[67] Phillips claimed that DAP dismissed him because of his disability, in violation of the ADA.[68] The court granted summary judgment for the employer, concluding that Phillips had not advanced sufficient evidence to show that his dismissal was based on his disability.[69] The dismissal was based on his skill level.[70] To be sure, his skill level was the result of his disability, but that did not mean that he had been dismissed on the basis of his disability, or so both the

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60. 42 U.S.C. § 12111(9) (2004).

61. Phillips v. DAP, Inc., 10 F. Supp. 2d 1334 (N.D. Ga. 1998). *See also* Am. Fed'n of Gov't Employees Council 33, Local 51 v. Bentsen, 1994 U.S. App. LEXIS 25260 (9th Cir. 1994) at *8 (holding that mint is not required to create new position for employee). The appendix to the federal regulations governing Title I of the ADA likewise specifies that job restructuring is not required, 29 C.F.R. § 1630.9, app. (2004).

62. *Phillips*, 10 F. Supp. 2d at 1335.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Phillips*, 10 F. Supp. 2d at 1335.

69. *Id.* at 1336.

70. *Id.*

employer and the court reasoned.[71]

The *Phillips* decision is an example of the limits of current ADA jurisprudence. Phillips was a long-term employee, satisfactorily performing a job that suited his skills, who became a casualty of changes in the workplace and business environment. DAP was not required to create or maintain a job for Phillips. Thus, Phillips was an employee who was not protected by the ADA, as the court read the ADA. Nor is the *Phillips* court's reading of the ADA idiosyncratic. The Appendix to the federal regulations governing Title I of the ADA specifies that the ADA guarantee is to put people with disabilities on an equal footing in seeking competitive employment. It reads:

> While the ADA focuses on eradicating barriers, the ADA does not relieve a disabled employee or applicant from the obligation to perform the essential functions of the job. To the contrary, the ADA is intended to enable disabled persons to compete in the workplace based on the same performance standards and requirements that employers expect of persons who are not disabled.[72]

That is, the ADA aims to provide equal competitive opportunities for people with disabilities—not to provide the supports, job restructuring, or economic assistance that would allow people with disabilities who are not fully competitive, even when the guarantees of the ADA are met, to enter the work force.

One response to the *Phillips* decision is that the court read the ADA too narrowly. The *Phillips* court granted summary judgment to Phillips' employer.[73] Phillips was thus precluded from a trial that would have examined questions such as whether there were training opportunities or job restructurings, including the possibilities of teamwork discussed below, which would have been reasonable accommodations for his continued employment. Current judicial interpretations of Title I of the ADA are notoriously limited; here, the limitation was taking the employer's description of the job at face value. An alternative interpretation of *Phillips* is that it demonstrates the inadequacy of the ADA when viewed as a civil rights statute. Under this interpretation, cases such as *Phillips* demonstrate the inability of the civil rights paradigm to improve the employment situation for people with cognitive disabilities. An alternative is to explore supported employment, income supports, or other methods of social support to ameliorate the economic circumstances of the long-term cognitively disabled.

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71. *Id.*

72. 42 C.F.R. § 1630, app. at Background (2004).

73. *Phillips*, 10 F. Supp. 2d at 1337.

B. From Civil Rights to Welfare: Economic Opportunities for People with Cognitive Disabilities

In several important articles, Mark Weber has argued that we need a new paradigm for employment of persons with disabilities.[74] Weber agrees that the ADA paradigm of leveling the playing field is inadequate to provide genuine employment opportunity for many people with disabilities.[75] In response to this inadequacy, Weber defends what he calls a "post-integrationist" position that incorporates affirmative action as in the civil rights model, socially shared supports for employment, and reformed welfare benefits.[76] While I agree with many of Weber's conclusions, I argue here that he gives inadequate attention to the mismatch between employment as a civil right for people with intellectual impairments, misleading beliefs about the nature of employment, and coordination problems in the current employment market. He thus moves too quickly away from civil rights and fails to recognize further possibilities for understanding employment for people with cognitive disabilities in civil rights terms.

The first step in Weber's argument is an enhanced understanding of the possibilities of affirmative action.[77] Weber contends that section 501 of the Rehabilitation Act, the section governing federal employment, rests on a paradigm of affirmative action that is stronger than the non-discrimination paradigm of section 504 and Title I of the ADA.[78] This paradigm demands that the federal government, as an employer, bring people with disabilities into the workplace in numbers which would be representative, absent discrimination, although it does not require imposing severe economic harm on the employer.[79] Weber then argues that the affirmative action paradigm for people with disabilities should "explicitly embrace numerical employment goals."[80] Weber further contends that this paradigm should be enforceable by a private right of

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74. Mark C. Weber, *Beyond the Americans with Disabilities Act: A National Employment Policy for People with Disabilities*, 46 BUFF. L. REV. 123, 156 (1998) [hereinafter Weber, *Beyond the ADA*].

75. *Id.* at 137-38.

76. Mark C. Weber, *Disability and the Law of Welfare: A Post-Integrationist Examination*, 2000 U. ILL. L. REV. 889, 893 (2000) [hereinafter Weber, *Disability and the Law of Welfare*].

77. Weber, *Beyond the ADA*, *supra* note 74, at 142.

78. Weber, *Disability and the Law of Welfare*, *supra* note 76; Weber, *Beyond the ADA*, *supra* note 74, at 156.

79. Weber, *Beyond the ADA*, *supra* note 74, at 149-50.

80. *Id.* at 160.

action[81] and should be extended to state and local governments and employers in the private sector.[82] He sees affirmative action in this sense as a corrective measure for ongoing, unconscious discrimination, and argues additionally for non-remedial set-asides in both public and private employment.[83] Weber believes that this employment policy is fair, economically competitive, and unlikely to lead to feather-bedding or "make-work."[84]

In a subsequent article, Weber moves beyond affirmative action to what he calls a "post-integrationist" position.[85] Historically, "custodialism" was the dominant model for disability policy in the United States; it represented the idea that people with disabilities needed protection and support through welfare.[86] Custodialism marginalized and paternalized people with disabilities. "Integrationism" was the effort to use civil rights to bring people with disabilities into the social mainstream.[87] Integrationism, exemplified by the ADA, failed on a number of counts, according to Weber, not the least of which is that it left many with disabilities in problematic economic circumstances.[88] "Post-integrationism" brings many factors together to remedy the inadequacies of integrationism.[89] As with post-modernism, not all of these factors may fit together well.[90] Development of anti-discrimination law, including affirmative action, remains important but must be supplemented by developments in welfare law.[91] The stinginess of SSI must be reassessed, as must the distinction between SSI as a program for those who are unable to work and work-related programs such as Social Security Disability Insurance, private disability insurance, and workers' compensation.[92] Rehabilitation services must be increased and eligibility criteria for them broadened.[93] Finally, welfare itself

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81. *Id.* at 161.

82. *Id.* at 162-64.

83. *Id.* at 166.

84. *Id.* at 171-72.

85. Weber, *Disability and the Law of Welfare, supra* note 76, at 892.

86. *Id.* at 899.

87. *Id.* at 903.

88. *Id.* at 908.

89. *Id.* at 912.

90. *Id.* at 941. Weber writes, almost gleefully, "Almost like post-modernist art, literature, or architecture, post-integrationist programs need to draw ideas from every era to produce structures responsive to contemporary needs."

91. Weber, *Disability and the Law of Welfare, supra* note 76, at 922-23.

92. *Id.* at 932-33.

93. *Id.* at 933-34. An illustration of this strategy is the 1998 amendments to the Rehabilitation Act, enacted as Title IV of the Workforce Investment Act of 1998, Pub. L. No. 105-

must be re-examined to take into account the extent to which current welfare-to-work programs may impose "[u]nrealistic expectations for work" on people with less than total disability.[94] The current move away from welfare, Weber contends, fails to adequately account for the diversity among people with disabilities and the extent to which some will be unable to compete in the productive marketplace and will ineluctably require income supplementation.[95] While in the end Weber is surely right about the need for income supplementation and the justice of sharing the costs socially, he moves away from the civil rights paradigm too quickly. In so doing, he underestimates the productive potential of people with intellectual disabilities. Such underestimation appears in the few reported cases in which people with cognitive disabilities have pressed employment discrimination claims.

C. Illustrative Cases

Very few litigated cases involve employment discrimination claims brought by people with cognitive disabilities. Even fewer cases feature people with life-long cognitive disabilities; the plaintiffs in most reported decisions have temporary cognitive losses (e.g. from chemotherapy)[96] or have returned to work after accidents causing neurological damage.[97] Data from 1992-97

220, 112 Stat. 936 (1998). In theory, the amendments go further than the ADA and than the original Rehabilitation Act. (For a comparison of the Rehabilitation Act of 1973 and ADA Title I, arguing that the principal difference is the extension of Title I to private employers, *see* Kathleen D. Henry, *Civil Rights and the Disabled: A Comparison of the Rehabilitation Act of 1973 and the Americans with Disabilities Act in the Employment Setting*, 54 ALB. L. REV. 123 (1990)). I say in theory because there are very real questions about funding levels and service provision under the Workforce Act. *See* Kregel, *supra* note 20, at 96 (Alexander J. Tymchuk et al. eds., 2001). The Workforce Investment Act amendments require vocational training for all qualified persons with disabilities. *See* DREW & HARDMAN, *supra* note 5, at 255. In enacting these amendments, Congress made findings that having a disability does not diminish the right of a person to live independently, enjoy self-determination, make choices, contribute to society, pursue a meaningful career, and "enjoy full inclusion and integration in the economic, political, social, cultural, and educational mainstream of American society." 29 U.S.C. § 701(a)(3)(A)-(F) (2004). To this end, the Workforce Investment Act seeks to have the federal government play a leadership role in promoting the employment of people with disabilities and to assist state governments "in fulfilling the aspirations of such individuals with disabilities for meaningful and gainful employment and independent living." 29 U.S.C. § 701(b)(2) (2004). The Act's statement of policy emphasizes the importance of meaningful work: "work . . .is a valued activity, both for individuals and society; and fulfills the need of an individual to be productive, promotes independence, enhances self-esteem, and allows for participation in the mainstream of life in the United States." 29 U.S.C. § 7 (2004). Other advanced industrialized countries have explored similar efforts to bring people with disabilities into the workforce. For a comparison of the ADA and employment policy in other countries with important suggestions for further research, *see* Blanck & Schartz, *supra* note 56.

94. Weber, *Disability and the Law of Welfare*, *supra* note 76, at 941.

95. *Id.*

96. *E.g.*, Whitney v. Greenberg, Rosenblatt, Kull & Bitsoli, 258 F.3d 30 (1st Cir. 2001).

97. *E.g.*, Moysis v. DTG Datanet, 278 F.3d 819 (8th Cir. 2002).

indicate that less than 1% of the Title I complaints to the EEOC were brought by persons with cognitive disabilities.[98] Perhaps this paucity of litigation indicates that people with mental retardation are much less likely to attempt to enter the work force at all; the fact that most of the employment discrimination complaints did not involve discrimination in hiring decisions—the point of entry into the workforce—is indirect support for this contention.[99] The recently decided cases discussed below illustrate typical ways in which the employment potential of people with lifelong intellectual disabilities is underestimated in current law and in the current structure of employment. As such, these cases suggest further ways of developing the civil rights paradigm with respect to people with cognitive disabilities.

1. Self-accommodation

The first vertex of the problematic triangle for people with disabilities alleging employment discrimination is self-accommodation—success despite a disability. People with intellectual disabilities at this vertex have been subjected to the Supreme Court's recent narrow reading of the definition of disability.[100] *Emory v. AstraZeneca Pharmaceuticals*[101] illustrates the problems posed by self-accommodation for people with cognitive disabilities. Emory contended that cerebral palsy and learning disabilities substantially limited him in the major life activities of completing manual tasks and learning.[102] He had been employed as a Maintenance Custodian at AstraZeneca for 26 years; during that time, he had also worked as a Detail Foreman, a job with some management responsibilities.[103] His performance evaluations had always been positive.[104] When AstraZeneca posted a new position, Second Shift Services Coordinator, Emory applied for it but was not selected.[105] He claimed the failure to promote him was discrimination on the basis of his disability.[106]

AstraZeneca moved for summary judgment on the theory that Emory had not shown that he was substantially limited in a major life activity and thus did

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98. Kregel, *supra* note 20, at 89.

99. *Id.*

100. *E.g.*, Sutton v. United Airlines, 527 U.S. 471 (1999).

101. Emory v. AstraZeneca Pharmaceuticals, 2003 U.S. Dist. LEXIS 22430 (D. Del. 2003).

102. *Id.* at *3-4.

103. *Id.* at *2.

104. *Id.*

105. *Id.*

106. *Id.* at *3.

not qualify as disabled under the ADA.[107] Emory alleged that, because of his cerebral palsy, he was substantially limited in the major life activities of completing manual tasks and learning.[108] There was no dispute that cerebral palsy was a qualifying impairment.[109] There was also no dispute that learning and completing manual tasks are major life activities for purposes of the definition of disability under the ADA.[110] The dispute was instead over whether Emory was substantially limited in these activities.[111] On this score, his success was his undoing; the court granted AstraZeneca's motion for summary judgment.[112] The court's reasoning illustrates the consequences of self-accommodation for people with cognitive disabilities.

The court's analysis of whether Emory was limited in the major life activity of learning illustrated the problem posed by self-accommodation. The standard applied by the court was "how the individual's difficulty to learn compares with the average person's difficulty and whether this disparity means the individual is significantly restricted."[113] Emory had graduated from high school, albeit in special education courses, and had continued to upgrade his computer skills through occupational training.[114] He had passed the certification requirements to become a fireman and a family mediator.[115] The court concluded that, given this success, he "cannot establish that his learning difficulties amount to a disability under the ADA."[116] This conclusory discussion was entirely outcome-oriented. The court never considered whether Emory had encountered much more significant difficulties than would have been usual in achieving what he did. It ignored such comparative inquiry altogether and looked only at Emory's achievements. The court's discussion of the major life activity of performing manual tasks was similarly flawed. The court noted that Emory had "some limitations" and "need[ed] assistance" in his ability to do household chores, but concluded that "[these] limitations [were] not substantial or severe" because of the important tasks Emory could perform.[117] Emory drove, was married and had raised children, operated a

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107. *Emory*, 2003 U.S. Dist. 224300 at *4.

108. *Id.* at *3-4.

109. *Id.* at *8.

110. *Id.* at *9.

111. *Id.* at *10.

112. *Id.* at *14.

113. *Emory*, 2003 U.S. Dist. 224300 at *12.

114. *Id.*

115. *Id.*

116. *Id.* at *12-13.

117. *Id.* at *11.

cleaning business on the side, and served his community as a firefighter.[118] These successes were sufficient to preclude Emory from being substantially limited in the major life activity of performing manual tasks and thereby claiming the protection of the ADA.[119] Here again, the court ignored whether Emory had encountered greater than average difficulties in attaining these achievements. Such outcome-based analyses are problematic for all cases of disability, but they are particularly problematic for cases of intellectual impairments. Reaching the outcomes Emory achieved should not be equated with being "average." Outcome measures may both underestimate the extent of Emory's achievements and overestimate the extent to which his capacities differ from the average. They mistakenly assume that because of his accomplishments—which were undeniably impressive—he cannot be cognitively disabled.

2. Support on the Job

A second recent ruling illustrates the difficulties for people with intellectual disabilities when work is understood in highly individualistic terms. "Job coaching" is a strategy utilized to help people with intellectual impairments with learning and performing jobs.[120] The regulations governing Title I of the ADA recognize that temporary job coaching may be determined to be a reasonable accommodation on a case-by-case basis.[121] In general, however, the regulations stipulate that job coaching is not a reasonable accommodation for which the employer is required to pay.[122] The regulations do not consider the possibility that sources other than the employer (parents, social service agencies, private charities) might underwrite the expenses of the coach, although this is a common practice. In a recent district court ruling, a suit by an employee, who was fired because of the presence of a job coach, survived a motion for summary judgment.[123] Limits imposed in the court's ruling, however, illustrate how mistaken assumptions about employment may be

118. *Id.*

119. *Emory*, 2003 U.S. Dist. 224300 at *11.

120. DREW & HARDMAN, *supra* note 5, at 306.

121. 29 C.F.R. app. § 1630.9 (2004). Additionally, the EEOC has issued an Enforcement Guidance on the ADA and Psychiatric Disabilities (amended in 1997 to take *Sutton* into account) *available at* http://www.eeoc.gov/policy/docs/psych.html (last visited Aug. 1, 2004). There is no special guidance regarding mental retardation. The special guidance on psychiatric disabilities specifically says that an employer-provided temporary job coach might be required as a reasonable accommodation on a case-by-case basis, if it is not an undue hardship. *Id.* An accommodation may also include a longer-term coach if the coach is paid for by a social service agency, again barring undue hardship. *Id.*

122. 29 C.F.R. app. § 1630.9 (2004).

123. EEOC v. Dollar Gen. Corp., 252 F. Supp. 2d 277 (M.D.N.C. 2003).

applied to employees who are dependent on job coaching for employment success.

Bobbie Bost, the employee in the case, was a 45-year-old woman with moderate mental retardation.[124] She lived in a group home with 24-hour supervision[125] and worked with a job coach, Robin Onuoha.[126] One of Onuoha's functions as Bost's coach was to help her in finding employment; with Onuoha's assistance, Bost applied for and received a position as a clerk at a Dollar General store.[127] Onuoha explained to the manager that she would be with Bost to help her with understanding and remembering instructions, with arranging her workplace to make it more manageable for her to perform tasks, and with performing tasks she could not do independently.[128] Dollar General did not bear any of the costs of Onuoha's coaching.[129] Bost's duties included cleaning bathrooms and other areas of the store, folding merchandise and putting it away, picking up trash, and carrying boxes to the trash.[130] Bost performed all these tasks properly, with the assistance of the coach.[131] Bost could not, however, operate a cash register or unload boxes from delivery trucks; during her four months of employment with Dollar General, she was not asked to do any of these tasks.[132]

When Bost was hired, the assistant store manager was Kenyatta Smith.[133] Before hiring Bost, Smith sought the approval of the district manager, Ricky McCray.[134] Shortly thereafter, Kathryn Von Cannon became manager of the store; it was her understanding that she could not fire employees without McCray's approval.[135] When McCray visited the store where Bost worked and saw Bost, he allegedly said "are we paying for that?" and "well, get rid of it."[136] Von Cannon then fired Bost.[137] The expressed reason for the discharge was

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124. *Id.* at 280.

125. *Id.* at 284.

126. *Id.* at 280.

127. *Id.*

128. *Id.*

129. *Dollar Gen. Corp.*, 252 F. Supp. 2d at 280.

130. *Id.* at 280-81.

131. *Id.* at 281.

132. *Id.* at 280.

133. *Id.*

134. *Id.*

135. *Dollar Gen. Corp.*, 252 F. Supp. 2d at 281.

136. *Id.*

137. *Id.*

"lack of work" and "payroll," but Dollar General continued to hire new clerks.[138]

The reported decision ruled on cross motions for summary judgment.[139] Dollar General based its motion for summary judgment on the assertion that Bost could not perform the essential functions of the clerk position and was therefore not a qualified individual with a disability.[140] Dollar's argument relied on the job coach and on Bost's inability to perform tasks such as operating the cash register that, Dollar contended, were essential functions for a clerk.[141] Bost's motion contended that she had established a prima facie case of discrimination and Dollar had not brought forth any non-pretextual reason for the termination.[142] The court concluded that there were genuine issues of material fact about Bost's qualifications and about Dollar's reasons for terminating her, and denied both motions.[143]

It was undisputed that Bost had a disability, mental retardation.[144] Although Dollar raised questions about the evidence, the court also concluded that Bost was substantially limited in the major life activities of thinking, learning, self-care, and communication.[145] With respect to the qualifications required for the clerk position, the court concluded as a matter of law that Dollar had established a modified position that did not require her to perform all the functions of a clerk.[146] Although Dollar had a store manual that listed only three positions—manager, assistant manager, and clerk—Dollar's practice was not to insist that all clerks perform every function of the position.[147] Moreover, there was no evidence that Bost had failed to perform satisfactorily in the tasks she was assigned; indeed, she typically would ask for more work when she had completed her assigned tasks.[148]

The difficult issue in the case was whether the job coach was a reasonable accommodation. Dollar's position was that while a temporary coach might be reasonable depending on the circumstances, the indefinite need for a coach

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138. *Id.*

139. *Id.* at 293.

140. *Id.* at 281-82.

141. *Dollar Gen. Corp.*, 252 F. Supp. 2d at 285.

142. *Id.* at 282.

143. *Id.* at 293.

144. *Id.* at 284.

145. *Id.*

146. *Id.* at 286.

147. *Dollar Gen. Corp.*, 252 F. Supp. 2d at 286.

148. *Id.* at 287.

could not be.[149] In Dollar's view, an individual could not be qualified if she required ongoing assistance; the need for such assistance would show that she could not perform the job.[150] Nor could the individual be qualified if the job coach performed some of her tasks; that would show she could not do what she had been hired to do.[151] Bost argued to the contrary that the ongoing need for a reader for a blind employee, or a signer for a deaf employee, does not defeat the claim of qualifications.[152] A job coach's help with instructions should be viewed in similar fashion.[153] The court concluded that if the job coach were permanent, it would show Bost could not perform the job.[154] The court reached this conclusion despite the fact that the employer was not expected to pay for the coach;[155] there was also no indication in the case that the coach interrupted the normal flow of business in the store. The court also concluded that if the coach were performing some of Bost's assigned tasks that fact would suffice to show that Bost was not qualified.[156] It concluded that there were material issues of fact on both counts.[157] In ruling as it did about job coaching, the court referred to two earlier, unreported decisions, concluding that use of a coach on a permanent basis would show the employee was unqualified, even if the employer were not required to pay for the coach.[158] In one of these cases, the court had ruled that an employee with Down syndrome whose mother came along to help him do his job was not qualified within the meaning of the ADA.[159]

Thus, to summarize, as the *Dollar General* court read the ADA, employee qualifications are to be measured in their unsupported state. Job coaching must be temporary and must not supplant the employee's individual performance. Permanent job coaching cannot be a reasonable accommodation as a matter of law, even if the employer bears no costs and incurs no inconvenience. Such isolationist demands are not made of either physically disabled employees (who may need readers, signers, and so on) or even non-disabled employees, who may have to work together to accomplish their tasks.

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149. *Id.* at 290.

150. *Id.*

151. *Id.*

152. *Id.*

153. *Dollar Gen. Corp.*, 252 F. Supp. 2d at 290.

154. *Id.* at 293.

155. *Id.* at 280.

156. *Id.* at 293.

157. *Id.*

158. *Id.* at 291.

159. *Dollar Gen. Corp.*, 252 F. Supp. 2d at 291.

3. Teamwork

In addition to supported employment, employment teams are another strategy to enhance the employment potential of people with intellectual disabilities.[160] Teamwork can be especially helpful in encouraging socially appropriate behavior.[161] Nonetheless, courts have rejected the requirement that jobs be structured into teams as reasonable accommodations under the ADA. In *Walsted,*[162] for example, the employee was fired for on-the-job misbehavior; she contended that, because of her disability, she did not understand that what she was doing was wrong.[163] The employer contested Walsted's claims that she was disabled under the terms of the ADA, that she was otherwise qualified, and that a reasonable accommodation was available.[164] In denying Woodbury County's motion for summary judgment, the court concluded that Walsted had raised issues of material fact on each contention.[165] Like other courts, however, the *Walsted* court limited its ruling in ways that may diminish recognition of the capacities of people with intellectual disabilities.

The initial issue on which the court ruled was Walsted's claim to be disabled.[166] The undisputed facts were that Walsted was fifty-tyree years old, with a kindergarten education.[167] Her IQ score was 73; she had a kindergarten reading level, a first grade spelling ability, and a second grade arithmetic ability.[168] She alleged, although without support in the record, that she suffered from dyslexia.[169] Walsted argued that she was disabled because, as a result of her impairments, she was substantially limited in the major life activities of learning and reading.[170] To assess whether a limit is substantial, the court considers its nature and severity, its duration, and its long-term impact.[171] The court concluded that Walsted's assessment scores raised a genuine issue of material fact "that she is significantly restricted, as compared to an average person in the general population, as to the duration, manner, and condition

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160. DREW & HARDMAN *supra* note 5, at 306.

161. *Id.* at 307.

162. Walsted v. Woodbury County, 113 F. Supp. 2d 1318 (N.D. Iowa 2000).

163. *Id.* at 1333-34.

164. *Id.* at 1321.

165. *Id.* at 1343.

166. *Id.* at 1327-31.

167. *Id.* at 1322.

168. *Walsted,* 113 F. Supp. 2d at 1322.

169. *Id.* at 1322 n.1.

170. *Id.* at 1329.

171. *Id.* at 1327.

under which she can conduct the 'major life activities' of learning and reading."[172] The court also determined that Walsted had raised the issue of whether she was substantially limited in the major life activities of thinking and concentrating.[173] Because she had not introduced relevant evidence, the court rejected her contention that she was substantially limited in the major life activity of interacting with others.[174] The court did not reach the question of whether she was substantially limited in the major life activity of working.[175] This last question, the court said, should be reached only if she were unsuccessful in alleging limits in other major life activities.[176]

The second issue on which the court ruled was Walsted's claim that she was otherwise qualified for her employment.[177] Walsted had begun work as a custodial employee for Woodbury County in 1989.[178] Her responsibilities included general office cleaning and maintaining restroom supplies.[179] She performed these duties without incident until 1995, when a new building superintendent was appointed.[180] The new superintendent, Elgert, had no experience in working with employees with disabilities.[181] Shortly thereafter, Walsted was charged with the theft of a fellow employee's wallet.[182] Her story was that she had decided to play a "trick" on her co-worker by hiding her wallet.[183] Indeed, she did not take the wallet away from the workplace or take anything out of it.[184] As a result of this incident, Walsted was suspended without pay and referred to the employee assistance program.[185] Her superintendent gave her a memo about job expectations and explained it to her and she returned to work.[186] Before 1995, most of Walsted's work had been

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172. *Id.* at 1329.

173. *Id.* at 1330.

174. *Walsted,* 113 F. Supp. 2d at 1330.

175. *Id.*

176. *Id.* at 1330-31.

177. *Id.* at 1331-33.

178. *Id.* at 1322.

179. *Id.*

180. *Walsted,* 113 F. Supp. 2d at 1322.

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.* at 1323.

185. *Id.*

186. *Walsted,* 113 F. Supp. 2d at 1323.

with other custodians.[187] After the appointment of the new superintendent, she was assigned a new route, the Courthouse basement area, which included the Department of Motor Vehicles.[188] The assignment left her with mostly solitary work.[189] She was given no orientation to the area and no training about items to be found there.[190] In 1997, she was arrested for the theft of automobile validation stickers.[191] Her explanation was that when she got bored, she practiced wrapping boxes she had retrieved from the trash.[192] She found the stickers on the desk and used them to decorate the boxes.[193] After this incident, she was fired.[194]

Woodbury County contended that these incidents demonstrated that Walsted was not qualified for the job of custodian.[195] One of the essential duties of her job was her responsibility for seeing that papers, documents and belongings remained undisturbed as she cleaned.[196] Her two convictions for theft demonstrated that she could not meet this requirement, according to the County.[197] Walsted contended, on the other hand, that she had performed the job satisfactorily for eight years.[198] With better supervision, she argued, she would have understood the importance of documents and items.[199] Had she been assigned a different work area, with other custodial workers, she would not have had those difficulties.[200] The County argued that they had provided her with sufficient training, and the additional supervision she requested was not a reasonable accommodation.[201] The court concluded that because of her generally satisfactory work experience of over eight years, Walsted had raised a material issue of fact about whether she met necessary job prerequisites.[202] The

187. *Id.* at 1322.

188. *Id.* at 1323.

189. *Id.*

190. *Id.*

191. *Id.*

192. *Walsted,* 113 F. Supp. 2d at 1323.

193. *Id.*

194. *Id.*

195. *Id.* at 1331.

196. *Id.*

197. *Id.*

198. *Walsted,* 113 F. Supp. 2d at 1332.

199. *Id.*

200. *Id.*

201. *Id.* at 1333-34.

202. *Id.* at 1332.

court also concluded that there was a material issue about whether the County had provided sufficient accommodation in the form of job training.[203] Although the County had attempted to educate Walsted after the first theft incident, there was no evidence in the record that the referral to the Employee Assistance Program provided her with meaningful help, given her cognitive disabilities.[204] The court concluded that Walsted had raised a material issue about whether the County could have provided her with further and more appropriate training as an accommodation.[205]

At the same time, however, the court made clear that it would reject several other accommodations that might be requested on Walsted's behalf. The County was not required to eliminate essential job functions, assign someone to watch her, or hire additional staff.[206] Nor was it required to reassign existing workers to assist her in her duties or to transfer her to another location.[207] Of these, transfer was the only accommodation actually requested by Walsted; the court raised the other suggestions on its own.[208] In raising and dismissing these suggestions, the court raised the threat of expensive alterations in job circumstances as special accommodations to Walsted. The court did not consider whether in the circumstances of this case, given the decision to shift away from an apparently successful prior teamwork structure, any of these might have been reasonable accommodations. The court simply took for granted the job structure the County had put into place. Walsted had also raised the issue of whether Woodbury County had appropriately engaged in an interactive process of identifying accommodations with her.[209] Finally, Woodbury County claimed that they had discharged Walsted for a non-discriminatory reason: theft.[210] The County's view was that they could hold Walsted to the same disciplinary standard that they would hold any other employee.[211] Walsted contended that her misconduct was causally related to her disability and neither presented a direct threat nor came within the ADA's provisions about alcohol or drug abuse.[212] The court rejected the idea that the County could simply hold Walsted to exactly the same standard of conduct as a nondisabled employee,

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203. *Id.* at 1333-34.

204. *Walsted,* 113 F. Supp. 2d at 1333.

205. *Id.* at 1334.

206. *Id.* at 1333-34.

207. *Id.* at 1334.

208. *Id.*

209. *Id.* at 1335.

210. *Walsted,* 113 F. Supp. 2d at 1338.

211. *Id.*

212. *Id.* at 1339.

concluding that Walsted's misconduct should have been considered under the standards for an accommodative process.[213]

The *Walsted* court thus both opened and closed opportunities for accommodation for Walsted. It opened the possibility of re-examining the training she had received and of further training aimed at enabling her to succeed as a solitary worker. But it closed the possibility of re-examining the individualized job assignments.

III. CONCLUSION

If the ADA is read narrowly, as it has been by contemporary courts, it does not protect people with intellectual disabilities in many contexts. One way to interpret this protective gap is that it responds to the productive incapacities of people with cognitive disabilities. Another way of interpreting the gap, however, is that it exists at least in part because of problematic assumptions about both cognitive disabilities and the nature of work. *Emory* illustrates how courts may misconstrue outcomes for capacities. *Dollar General* and *Walsted* assume that performance must be individual. Individuals who work with coaches or in teams are deemed unqualified because of their need for cooperation—or so these courts assumed in concluding that coaching or team assignments could not be reasonable accommodations. Without such assumptions, the issue instead would have been whether such restructuring of work was an undue hardship, by virtue of its expense, inconvenience, or other difficulties.

These individualistic assumptions about work are particularly damaging for people with cognitive disabilities. They deprive people with cognitive disabilities of workplace accommodations that are especially likely to foster success on the job for them. But we do not, in other areas of life, regard people as deficient because they do better with coordination or cooperation. Ride sharing is an encouraged method for reducing the personal and social costs of driving to work individually. The economics literature recognizes employment teams as potentially efficient.[214] Imposing individualistic assumptions on people with intellectual disabilities may create significant barriers to their participation in the workplace and, as a result of their clustering at the third vertex of inability to self-accommodate or compete successfully with accommodations, consign them to the lot of the apparently unqualified. Continued questioning of these assumptions about individual capacities and the nature of work may help us to recognize that we have been too quick to conclude that people with cognitive disabilities cannot perform jobs

213. *Id.* at 1342.

214. *See, e.g.*, A. Alchian & H. Demsetz, *Production, Information Costs, and Economic Organization*, 62 AM. ECON. REV. 777 (1972).

satisfactorily without "special" support. These assumptions are discriminatory; re-examining them is demanded by civil rights, not welfare.